

CIA Comments on Draft Report
Entitled "National Security Secrets:
Their Proper Place in the Law"

1. The draft report of the Select Committee on Intelligence Subcommittee on Secrecy and Disclosure entitled "National Security Secrets: Their Proper Place in the Law" (hereinafter the report) is a noteworthy attempt to come to grips with a complex, difficult subject: the proper balancing of the often at odds objectives of enforcing the criminal laws and protecting national security interests. These objectives both rank very high on any scale of values and the Agency recognizes that the most desirable solution in cases of conflict is one that serves both interests. Unfortunately, it is not clear under our system of law, with its guarantees of public and jury trial and broad discovery rights for an accused, that both interests can always be served. No agency deserves blame for the dilemma posed by cases involving legitimate and important secrets and serious crimes. The dilemma is a product of the system and human behavior which, of course, is not controllable. As the report points out, the key to the proper resolution of this dilemma is the process by which the decision whether to prosecute such cases is reached.

2. In light of the above comments, the report gives the unwarranted impression that national security secrets have thwarted numerous prosecutions in a wide variety of situations.

a. Specifically, there are repeated references in the first 21 pages to perjury, extortion, bribery, narcotics and murder cases which have been hampered because of the dilemma posed by the need to use classified information. See pp. 5-6, 9, 17, and 21 (twice). The quoted testimony of [redacted] on p. 21 is inappropriate for adoption by the report. Not only is it disparaging of the intelligence profession, but it borders on hyperbole.

b. In the summary at D on pp. 5-6 reference is made to "murder cases" yet the statement on p. 9 is "possibly even one murder case." The Nha Trang murder on p. 26 would at best support only the statement on p. 9.

3. The report's treatment of the question of applicability of current criminal statutes to "leaks" is inadequate. The statement on p.41 to the effect that most leaks are not criminal because of "lack of criminal intent or direct communication to a foreign agent" creates confusion over whether there is a permissible basis for congressional enactment of criminal legislation in this area. The problem is not one of criminal intent -- the report seems to recognize that strict liability offenses are permissible -- but rather that there is no statute that was clearly intended to apply to leaks. Congress simply has not expressed an intent to generally make such conduct criminal. In both the summary on p. 4 and in the recommendation on p. 55 the report concludes that Congress could more effectively devote its time to policing enforcement of the existing espionage statutes than in pursuing new legislation. This conclusion is the major shortcoming of the report and at odds with that reached by Professors Harold Edgar and Benno C. Schmidt in their definitive treatise "The Espionage Statutes and Publication of Defense Information," 73 Colum. L. Rev. 929 (1973). Their conclusion is that the espionage statutes are inadequate and clumsily drafted, even as they pertain to classical espionage, and should be rewritten.